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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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## In re Applications of

MM DOCKET NO. 93-88

EZ COMMUNICATIONS, INC.

File No. BRH-910401C2

For Renewal of License FM Radio  
Station WBZZ(FM) on Channel 229B  
at Pittsburgh, Pennsylvania

ALLEGHENY COMMUNICATIONS GROUP, INC.

File No. BPH-910628MC

# For a Construction Permit for a New FM Broadcast Station on Channel 229B at Pittsburgh, Pennsylvania

## MEMORANDUM OPINION AND ORDER

**Issued: January 10, 1997; Released: January 13, 1997**

1. Under consideration are 1) Joint Request for Approval of Settlement Agreement, filed November 12, 1996 b EZ Communications, Inc. and Allegheny Communications Group, Inc.; and 2) Mass Media Bureau's Comments on Joint Request for Approval of Settlement Agreement, filed by the Bureau on November 21, 1996.

2. Allegheny's construction permit application is mutually exclusive with the pending renewal application of EZ. Both applications were the subject of a comparative hearing in the fall of 1993. To date, no Initial Decision has been released.

3. To resolve the conflict between these applications, the parties have entered a settlement agreement which provides for the dismissal of Allegheny's application, the grant of EZ's application, and reimbursement of Allegheny by EZ in an amount in excess of Allegheny's reasonable and prudent expenses incurred in preparing and prosecuting its application. As noted in the joint request, approval of the settlement agreement will require waiver of Section 73.3523 of the Commission's rules because the payment would be made prior to the release of an Initial Decision in this case and because the payment specified in the agreement exceeds the amount permitted by that rule. <sup>1/</sup> In this latter connection, it is significant that Allegheny's application

<sup>17</sup> In 1989, after notice and comment rulemaking, the Commission concluded that some parties were filing applications against renewal applicants, not to secure a broadcast license but solely to obtain monetary settlements, and the agency determined that restrictions were needed to curb the abuses. As a result, the Commission adopted restrictions on the timing and amount of settlement payments. The new rule banned all payments to competing applicants for the withdrawal of an application prior to release of an Initial Decision in a comparative renewal case.

was filed after the renewal settlement restrictions in Section 73.3523 had already been adopted, and such restrictions limited its expectations at the time of filing.


4. Because of the ongoing "freeze" on the processing of comparative applications, the Commission determined in the past that it was appropriate to waive Section 73.3523 (b) (1) and allow monetary settlements of renewal cases in advance of the release of an Initial Decision.<sup>2/</sup> For the ninety day period following September 15, 1995, the Commission allowed parties who had not yet received an Initial Decision in their cases to dismiss their applications in exchange for reimbursement of the legitimate and prudent expenses they had incurred in prosecuting their applications. The same reasons that justified a Commission waiver of the settlement time restriction in 1995 may continue to support such a waiver in this case.

5. Moreover, waiver of the limit on the settlement payment to be made in this case may also be indicated. By Section 309 (k) of the Telecommunications Act of 1996 (Public Law No. 104-104, 110 Stat. 56 (1996)), the right of challengers, such as Allegheny, to file applications against an incumbent licensee's renewal application, is eliminated. Without the opportunity to file and precipitate a hearing, Section 73.3523 may no longer need to address limits on monetary settlements in challenged license renewal proceedings as a means of deterring non-bona fide filings. It is doubtful that continued adherence to the rule serves any public interest purpose.

6. With their joint request, the parties have submitted appropriate declarations stating that the Allegheny application was not filed for the purpose of reaching or carrying out an agreement regarding the dismissal or withdrawal of Allegheny's application, and that the settlement agreement constitutes the entire agreement between the parties.

7. The settlement agreement cannot be approved without a waiver of Section 73.3523. Waiver of that rule in this case is a matter of policy to be determined by the Commission. Accordingly, the question of whether waiver of the rule is warranted is certified to the Commission.

FEDERAL COMMUNICATIONS COMMISSION

  
Edward Luton  
Administrative Law Judge

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The new rule did allow settlement payments after the release of an Initial Decision but restricted such payments to reimbursement of the legitimate and prudent expenses incurred by the withdrawing party in filing and prosecuting its application. Broadcast Renewal Applicants, 66 RR 2d 708, 715 (1989); 47 C.F.R. §73.3523 (b) (1) and (b) (2).

<sup>2/</sup> FCC Public Notice, "FCC Waives Limitations on Payments to Dismissing Applicants in Universal Settlements of Cases Subject to Comparative Proceedings Freeze Policy," 10 FCC Rcd. 12182.